Supreme Court, U.S.
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No. 91-100

In The

# Supreme Court of the United States

October Term, 1991

RICHARD ROPER, Administrator,
et al., on behalf of themselves and
all others similarly situated,

*Petitioners,*

v.

CONSURVE, INC., d/b/a BANKAMERICARD
CENTER and DEPOSIT GUARANTY NATIONAL BANK,

*Respondents.*

**Petition For Writ Of Certiorari
To The United States Court Of
Appeals For The Fifth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

VARDAMAN S. DUNN
WILLIAM F. GOODMAN, JR.
(Counsel of Record)
WATKINS & EAGER
400 E. Capitol Street, Suite 300
P.O. Box 650
Jackson, Mississippi 39205
(601) 948-6470

*Counsel for Respondents*

Dated: August 14, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED*

1. Whether the Bank's interest charges on credit card balances in 1969 to 1974, plainly not usurious under state law, were permitted by the National Bank Act, 12 U.S.C. § 85, precluding any claim for a penalty under 12 U.S.C. § 86.

2. Whether "the rate allowed by the laws of the State" (the rate allowed national banks in 12 U.S.C. § 85) included the rate retroactively established by state law.

3. Whether borrowers have vested rights to recover a penalty for usury or inchoate rights which vest only upon judgment.

4. Whether the "most favored lender" status of national banks under 12 U.S.C. § 85 entitles a national bank to collect interest at rates allowed by a retroactive change in the state's usury laws, where all other lenders in the state are allowed to do so.

5. The general federal saving statute, 1 U.S.C. § 109, saves any penalty or liability incurred under a federal statute prior to its repeal unless the federal repealing Act expressly provides otherwise. The National Bank Act, a federal statute, allows interest to be charged at the rate allowable by the state. Does 1 U.S.C. § 109 apply to the amendment of a state usury statute? Even if so, is the application of 1 U.S.C. § 109 necessary to the decision in this case?

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* The questions posed by the petitioners are predicated upon an erroneous assertion that state action dispossessed them of an accrued or vested penalty.

## PARTIES TO THE PROCEEDING

**Petitioners** (plaintiffs below):

Richard Roper, Administrator, et al., on behalf of themselves and all others similarly situated

**Respondents** (defendants below):

Consurve, Inc., d/b/a Bankamericard Center and Deposit Guaranty National Bank*

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* Respondents provide the following information pursuant to Rule 29.1 of this Court. The parent company of Consurve, Inc. is Deposit Guaranty National Bank. The parent company of Deposit Guaranty National Bank is Deposit Guaranty Corp. Regarding subsidiaries (except wholly owned subsidiaries), Consurve, Inc. has none; Deposit Guaranty National Bank has one, G & W Life Insurance Company.

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No. 91-100

In The

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October Term, 1991

RICHARD ROPER, Administrator, et al., on behalf of themselves and all others similarly situated,

*Petitioners,*

v.

CONSURVE, INC., d/b/a BANKAMERICARD CENTER and DEPOSIT GUARANTY NATIONAL BANK,

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

## COUNTERSTATEMENT OF THE CASE

The dispositive issue in this case is whether Deposit Guaranty[1] engaged in usurious practices in 1969 to 1974 with respect to interest collected on credit card balances. It is undisputed that in 1969 to 1974, Deposit Guaranty charged 1½ percent per month on unpaid credit card

[1] Respondents are collectively referred to herein as "Deposit Guaranty" or "Bank."

balances after a 30-day interest-free period following billing. (Appendix B-3)

The procedural history of the case is found in petitioners' Statement of the Case. On cross motions for summary judgment or partial summary judgment on the issue of Deposit Guaranty's liability under 12 U.S.C. §§ 85 and 86, the United States District Court for the Southern District of Mississippi entered summary judgment in favor of Deposit Guaranty. The District Court properly viewed the issue not as whether Mississippi could extinguish a federal penalty, but whether Deposit Guaranty's interest charges were usurious under 12 U.S.C. § 85, which incorporates by reference state usury laws. (Appendix B-2, 16)

The District Court held that 12 U.S.C. § 85 incorporated Mississippi usury law including the 1974 amendment making the higher rates set forth therein apply retroactively. It is undisputed that Deposit Guaranty's charges were not usurious under the 1974 amendment. The District Court further held that federal law's incorporation of the retroactivity provision of Mississippi's usury statute was required by the "most favored lender" doctrine, where Mississippi clearly applied the retroactivity provision to other lenders. Accordingly, the interest charges in question were not usurious. The District Court rejected plaintiffs' argument that pre-1974 usury law governed national banks while the 1974 retroactive amendment to the usury law governed other lenders during 1969 – 1974. The Court also held that 1 U.S.C. § 109 (the general federal saving statute) posed no impediment to its ruling. (Appendix B-1-19)

In a *per curiam* opinion, the United States Court of Appeals for the Fifth Circuit affirmed for the reasons set forth in the District Court opinion. (Appendix A-1-2)

Grounds other than those relied on by the District Court support judgment in favor of Deposit Guaranty. While the District Court did not find it necessary to expressly adopt such reasons, Deposit Guaranty does not intend to waive them and expressly reserves all grounds presented by it to the District Court and the Court of Appeals.

## REASONS FOR DENYING THE WRIT

### A. THE QUESTIONS PRESENTED ARE NOT OF SUFFICIENT IMPORTANCE TO MERIT CERTIORARI REVIEW.

The only reason offered by petitioners for granting the writ is that the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. To the contrary, while the precise question has not been addressed by this Court, its resolution depends on principles of law settled in this Court for over 100 years. Indeed, the Fifth Circuit decided not to publish its opinion pursuant to its Local Rule which precludes "publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law." (Appendix A-1)

In support of their assertion that an "important" federal question is at stake, petitioners state only that there are numerous federal statutes fixing penalties for

conduct which violates adopted or assimilated state law. This may or may not be (petitioners name none), but even assuming such, the existence of other federal statutes under which a similar question theoretically could arise does not make the question in this case important, i.e., deserving of certiorari review. The narrow question presented is not one as to which any debate is raging in the nation's courts, nor do petitioners so contend. Indeed, petitioners cite no case of any court construing the federal statute at issue in this case, or any other federal statute, in conflict with the Fifth Circuit's decision.

While petitioners do not, and could not, argue that the Fifth Circuit's decision conflicts with an applicable decision of this Court, they do argue that the opinion below conflicts with two "doctrines" announced by this Court. The holdings in the cases cited by petitioners, *McCarthy v. First National Bank of Rapid City, S.D.*, 223 U.S. 493 (1912) and *Farmers' & Mechanics' National Bank of Buffalo v. Dearing*, 91 U.S. 29 (1875), are not even applicable to the issue in this case. Petitioners' contention is really nothing more than an argument that the lower court was wrong. Accordingly, their argument regarding the alleged doctrines of the *McCarthy* and *Dearing* cases will be refuted in the following section addressing the merits.

## B. THE FIFTH CIRCUIT'S DECISION IS NOT WRONG.

Far from novel or troublesome or inconsistent with existing law, the question presented is one resolved by straightforward statutory construction, resting solidly on

two principles long ago established beyond peradventure by this Court: (i) the "most favored lender" doctrine, which embodies the legislative intent behind 12 U.S.C. §§ 85 and 86, and (ii) the principle that borrowers have no vested right in usury laws. The District Court and the Fifth Circuit correctly held that Deposit Guaranty's credit card charges in 1969 to 1974 were not usurious.

**1. Statutory Construction.**

Since Deposit Guaranty at all relevant times was a national bank, the rate of interest it could charge was controlled by 12 U.S.C. § 85. That section authorized the rate of interest allowed by the laws of the state in which the bank is located. (Appendix D-2) The penalty statute, 12 U.S.C. § 86, is wholly dependent on Section 85 as it provides for a penalty and forfeiture if interest is charged at a rate higher than allowed by Section 85. (Appendix D-3)

"The rate allowed by the laws of the State" in 1969 to 1974 was the rate allowed under the 1974 amendment to Mississippi's usury statute, Miss. Code Ann. § 75-17-1, *et seq.*, (1972 and 1975 Supp.).[2] The 1974 amendment expressly provides that its rates apply to pre-1974 loans. (Supp. Appendix A-9-10) The Mississippi Supreme Court has expressly upheld this retroactivity provision.

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[2] Relevant portions of Chapter 564, 1974 Mississippi Laws (sometimes hereinafter referred to as the 1974 amendment to the usury statute) are attached as the Supplemental Appendix (Supp. Appendix A-1-10). Section 1 of Chapter 564 was codified as Miss. Code Ann. § 75-17-1 (1975 Supp.); Section 7 was codified as Miss. Code Ann. § 75-17-17 (1975 Supp.).

*Cappaert v. Bierman*, 339 So. 2d 1355 (Miss. 1976). In *Cappaert*, interest collected by an individual as lender prior to the 1974 amendment was held not usurious where it exceeded the pre-1974 rate but was within the rate allowed by the 1974 amendment. *Id.* at 1359.

Petitioners concede that the rates state banks were allowed to charge in 1969 – 1974 were the rates allowed in the 1974 amendment. As to national banks, however, they argue that the 1966 amendment to the Mississippi usury statute determined the rates that could be charged in 1969 – 1974. That is, petitioners argue without support that "the rate allowed by the laws of the State" was different for state banks as opposed to national banks.

In construing "the rate allowed by the laws of the State," the court must look to the state court's interpretation of its usury statute. *First National Bank in Mena v. Nowlin*, 509 F.2d 872, 876 (8th Cir. 1975). As the court below found, 12 U.S.C. § 85 adopts and encompasses the entire body of case law interpreting the state's limitation of usury. (Appendix B-5) Both the express language of the Mississippi statute and the case law of Mississippi make clear that the 1974 amendment determines pre-1974 rates. *Cappaert*, 339 So. 2d at 1357. Petitioners can cite no case that remotely suggests that 12 U.S.C. § 85 should be construed to allow national banks to charge the rate allowed by the laws of the state, retroactivity provisions excepted.

In a usury case against a national bank – on all fours with this case – the District Court for the Western District of Tennessee held that 12 U.S.C. § 85 adopts Mississippi

usury law, including the retroactivity provision. Therefore, interest on credit card balances collected prior to 1974 was not usurious where it did not exceed the rate allowed by the 1974 amendment. *Walters v. First National Bank of Memphis*, No. 74-267-M (W.D. Tenn., June 12, 1985) (cited in District Court Opinion, Appendix B-9).

The federal and state law are in agreement that there can be no recovery for usury unless the words of the controlling statute plainly impose it on a strict and literal construction. *Tiffany v. The National Bank of the State of Missouri*, 85 U.S. (18 Wall.) 409 (1873); *Deposit Guaranty Bank & Trust Co. v. Williams*, 193 Miss. 432, 9 So. 2d 638, 640 (1942). In Mississippi, the usury statutes, being in derogation of the common law and penal in nature, are strictly construed against the claim of usury. *Liddell v. Litton Systems, Inc.*, 300 So. 2d 455, 456 (Miss. 1974). Petitioners have failed to bring themselves strictly within the usury statute.

Straightforward statutory construction yields the inevitable result that the interest rate allowable to Deposit Guaranty on credit card balances in 1969 – 1974 was that set forth in the 1974 amendment to the Mississippi usury statute. This result is also mandated by the "most favored lender" doctrine.

**2. The "Most Favored Lender" Doctrine.**

Petitioners ask this Court to rule that state banks in Mississippi were allowed to charge 1½ percent per month (18 percent per annum) on credit card charges in 1969 – 1974, but national banks were only allowed to

charge 8 percent per annum during the same period. On its face, such a result would plainly favor state banks over national banks in direct contravention of the "most favored lender" doctrine. That doctrine assures a national bank of treatment equal to that afforded to the "most favored lender" under the laws of the state in which the bank is located.

Based on Section 30 of the National Bank Act (now 12 U.S.C. § 85), the "most favored lender" doctrine has its case-law genesis in *Tiffany v. The National Bank of the State of Missouri*, 85 U.S. (18 Wall.) 409 (1873). In *Tiffany*, the State of Missouri allowed banks to receive 8 percent and individuals to receive 10 percent interest on loans. The Court, construing Section 30 of the National Bank Act, held that the national bank was entitled to charge the rates allowed natural persons or 10 percent, although state banks were limited to the lesser 8 percent rate. It was held that national banks were not restricted to the rates allowed state banks but could take the rates allowed to lenders generally. *Id.* at 412-13. The holding in *Tiffany* later was tagged as the "most favored lender doctrine," and the doctrine has been broadly and liberally applied in favor of national banks.

The "most favored lender" doctrine was soon to be recognized as mandating for national banks the right to take the highest rates allowable under state law to any lender of credit, including not only individuals, as in *Tiffany*, but savings and loan operations, small loan companies, and merchants selling goods on credit. *See, e.g., Northway Lanes v. Hackley Union National Bank & Trust Co.*, 464 F.2d 855, 862 (6th Cir. 1972) (savings and loan operations); *United Missouri Bank of Kansas City v. Danforth*, 394

F. Supp. 774, 785 (D. Mo. 1975) (small loan companies); *Fisher v. First National Bank of Omaha*, 548 F.2d 255, 261 (8th Cir. 1977) (same); *Fisher v. The First National Bank of Chicago*, 538 F.2d 1284, 1290-91 (7th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977) (same).

In 1936, the Comptroller of the Currency, with the duty of regulating national banks, rendered an interpretative opinion codifying the "most favored lender" doctrine as follows:

> (a) A national bank may charge interest at the maximum rate permitted by State law to any State-chartered or licensed lending institution. If State law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rates is subject only to the provisions of State law relating to such class of loans that are material to the determination of the interest rate. For example, a national bank may lawfully charge the highest rate permitted to be charged by a state licensed small loan company or Morris plan bank, without being so licensed.
>
> (b) A national bank located in a State the law of which denies the defense of usury to a corporate borrower may charge a corporate borrower any rate of interest agreed upon by such borrower.

12 C.F.R. § 7.7310 (1972).

As indicated in subsection (b) of the regulation, the "most favored lender" doctrine has been applied beyond the scope of equal rates for national banks to give national banks the benefit of exceptions to the usury laws for certain borrowers. *See, e.g., Bichel Optical Laboratory v. Marquette National Bank*, 336 F. Supp. 1368, 1370 (D. Minn.

1971), *aff'd.*, 487 F.2d 906 (8th Cir. 1973) (corporate borrower excluded from usury laws).

Despite the obvious discrimination which would exist against national banks if Mississippi state banks were permitted to charge higher interest rates than national banks in 1969 – 1974, petitioners argue that the Fifth Circuit in this case has improperly extended the "most favored lender" doctrine by allowing a "federal lawbreaker" to invoke the doctrine. Petitioners' argument begs the question. It assumes Deposit Guaranty violated 12 U.S.C. § 85 by charging interest at a rate higher than that allowed by the state. Yet that is the very question posed to the Court – and answered in the negative by the District Court and the Fifth Circuit. The "most favored lender" doctrine requires such a result. Petitioners' logic is flawed because it fails to recognize the inchoate nature of borrowers' rights under the usury laws. Such rights are not vested, but are given by statute and may be taken away by statute. (*See* Section B.3, *infra.*).

Petitioners' reliance on *The Farmers & Mechanics' National Bank of Buffalo v. Dearing*, 91 U.S. 29 (1875) is misplaced. *Dearing* holds only that the penalty provision of the National Bank Act (now 12 U.S.C. § 86) applies to all usurious transactions, regardless of whether the transaction is violative of a rate fixed by the state or a rate fixed by the National Bank Act (when no rate is fixed by the state); accordingly, no state usury penalty applies. 91 U.S. at 33. This is in keeping with Congress' intent to impose a uniform penalty for usury. It in no way undercuts the "most favored lender" doctrine, and certainly does not suggest that a penalty "attaches" at the time of the transaction. Yes, Congress does exercise control over

the penalty for usury; but this does not in any way detract from federal law's dependence on state law to determine whether usury has occurred in the first place. *Dearing* establishes no doctrine which has any direct bearing on this case.

### 3. No Vested Rights in the Usury Laws.

Unable to challenge the statutory construction of 12 U.S.C. § 85 applied by the district court and the appellate court below, petitioners attempt to avoid its effect through a legal fiction – that the federal penalty "attached" at the time interest was charged, and once attached could not be undone, save by Congress.

Such a fiction ignores the firmly established principle that borrowers have no vested right to recover a penalty for usury, even though their right has accrued for statute of limitations purposes. Rather, they have an inchoate right which vests only upon judgment. It is a right given by statute, and it can be taken away by statute. It is not part of the substance or merits of the contractual obligation, but is merely a statutorily supplied remedy.

This Court applied and explained the principle in *Ewell v. Daggs*, 108 U.S. 143 (1883). The makers of a promissory note set up the defense of usury under the laws of Texas in effect at the time interest was charged and collected. Prior to judgment, however, Texas repealed all usury laws. This Court held that the borrowers had no vested rights in the usury laws in effect at the time of the transaction, and accordingly, the defense of usury failed:

> [T]he more general and deeper principle . . . is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains *in fieri* . . . may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. . . .
>
> The right which the curative or repealing act takes away in such a case is the right in the party to avoid his contract, a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect.

*Id.* at 151.

The Mississippi Supreme Court held similarly in *Deposit Guaranty Bank & Trust Co. v. Williams*, 193 Miss. 432, 9 So. 2d 638 (1942), a case involving a state bank but otherwise similar to the case at bar. Because federal law adopts state law defining usury, in this context the state bank – national bank distinction is a distinction without a difference. In *Williams*, the makers of certain promissory notes raised the defense of usury under the laws of Mississippi at the time of the transaction. Prior to judgment, Mississippi amended its usury laws with the effect that the promissory notes in question were not usurious under the amended law. The amended usury statute was not expressly retroactive, though it also contained no

"savings clause." Rejecting the defense of usury, the Court held:

> Rights of action or defenses on account of usury are not a part of the common law. They are solely the creations of statute, and such statutes are in the nature of regulations in the public interest. Although a right conferred solely by statute in the public interest may have accrued before the repeal or modification, it does not follow that the accrued right in such cases is a vested right, in the constitutional sense. There is no vested right in the usury laws, which, therefore, may be repealed or changed so as to affect causes of action and defenses even in pending suits. . . . By the great weight of authority, the legislature may repeal a usury law and no one has any vested right to take advantage of such laws.

193 Miss. at 439, 9 So. 2d at 640. *Accord, Jefferson Standard Life Ins. Co. v. Dattel*, 83 F.2d 504, 507 (5th Cir.), *cert. denied*, 299 U.S. 567 (1936).

Petitioners' attempt to avoid the effect of *Ewell v. Daggs* by arguing that only Congress can take away a penalty it created is unpersuasive. First, it ignores federal law's adoption of state law defining usury; second, it assumes "attachment" of a federal penalty at the time interest is collected, an assumption directly conflicting with the teaching of *Ewell v. Daggs*.

Under the clearly applicable holdings of *Ewell v. Daggs*, *Deposit Guaranty Bank & Trust Co. v. Williams*, and *Jefferson Standard Life Ins. Co. v. Dattel*, petitioners in 1969 to 1974 had no vested rights in the usury laws of Mississippi. The legislature, which defined usury and created the right to a penalty for usurious contracts, redefined

usury and took away the right to a penalty for contracts no longer deemed usurious. The result is that petitioners are bound by the contracts they freely entered.

Petitioners rely on the "doctrine" of *McCarthy v. First National Bank of Rapid City, S. D.*, 223 U.S. 493 (1912). This case holds only that for statute of limitations purposes a cause of action for the usury penalty accrues on the date interest is paid. *Id.* at 499 (construing what is now 12 U.S.C. § 86). Petitioners fail to recognize the distinction between accrual of a cause of action and vesting of rights. As the Mississippi Supreme Court noted in *Deposit Guaranty Bank & Trust Co. v. Williams*, it does not follow that an accrued right is a vested right. 193 Miss. at 439, 9 So. 2d at 640. A holding that a cause of action, if any, accrues on the date interest is paid does not imply that the right is vested on that date. *Ewell v. Daggs* indeed establishes that rights under the usury laws are not then vested.

The only other case relied upon by petitioners for "attachment" of the federal penalty at the time of the transaction is *McCollum v. Hamilton National Bank*, 303 U.S. 245 (1938). Contrary to petitioners' assertion, the *McCollum* court did not hold that the bank immediately became liable for the penalty when it received interest. Rather, this statement was pure dictum. The holding of the case was that in a bankruptcy a creditor (national bank) was not entitled to have the amount of a judgment against it for usury penalty credited on its claim against the bankrupt estate. *Id.* at 247-249.

**4. The General Federal Saving Statute.**

As a last resort, petitioners attempt to invoke the general "catch-all" savings statute found in Title 1 of the

U. S. Code. Section 109 of Title 1 is a general act, obviously designed to avoid inadvertent retroactivity, destructive of substantive rights, by acts of Congress. It has never been applied to changes in the allowable interest rates fixed by the respective states. By its terms, it never applies if the "repealing act" does "expressly provide" for retroactive application.

As the District Court and Fifth Circuit held, Section 109 applies only to the repeal of federal statutes. (Appendix B-12) Since no federal statute was repealed or amended, Section 109 is inapplicable.

Even if it is assumed, for the sake of argument, that the 1974 amendment to the Mississippi usury statute constitutes the federal repealing statute, Section 109 does not save any usury penalty. Section 109 saves any "penalty, forfeiture, or liability" unless expressly otherwise provided in the repealing statute. The 1974 amendment to the usury statute expressly provides against a savings clause; it provides for retroactive application. Thus, application of Section 109 does not "save" any liability allegedly incurred prior to the 1974 amendment.

Petitioners' argument under Section 109 suffers from the same infirmity as its other arguments: it assumes that liability becomes "attached" or "fixed" at the time of collection of interest. Petitioners assume Deposit Guaranty became liable in 1969 – 1974, then argue that it remained liable because the 1974 amendment did not extinguish such liability, or such liability was saved by Section 109. *Ewell v. Daggs* leaves no room for such an argument: petitioners' assumption of the "attachment" of

liability is clearly erroneous. *A fortiori,* all arguments depending on this assumption must fail.

Seen in this light, petitioners' Section 109 argument is superfluous. If Deposit Guaranty is liable under 12 U.S.C. § 85, it is not necessary for Section 109 to "save" such liability; if it is not liable, there is no liability to be "saved."

## CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

VARDAMAN S. DUNN
WILLIAM F. GOODMAN, JR.
(Counsel of Record)
WATKINS & EAGER
400 E. Capitol Street,
Suite 300
Post Office Box 650
Jackson, MS 39205
(601) 948-6470

*Counsel for Respondents Consurve, Inc., d/b/a Bankamericard Center, and Deposit Guaranty National Bank*

DATED: August 14, 1991

## SUPPLEMENTAL APPENDIX

## CHAPTER 564

## HOUSE BILL NO. 819

**AN ACT** to simplify and modernize the laws governing the lending of money, usury, extending credit, and the making of credit sales; to protect consumers against unfair practices by suppliers of credit and to provide rate ceilings; to permit and encourage the development of sound consumer credit practices and to insure an adequate supply of credit; to amend Sections 63-19-43, 75-17-1, 75-67-127 and 75-67-217, Mississippi Code of 1972; to repeal Sections 63-19-49, 75-18-1, 75-18-3, 75-18-5, 75-18-7, 75-18-9, 75-18-11, 75-67-117 and 75-67-125, Mississippi Code of 1972; and for related purposes.

***Be it enacted by the Legislature of the State of Mississippi:***

**Section 1.** Section 75-17-1, Mississippi Code of 1972, is amended as follows:

**75-17-1. Legal rates of interest and finance charges.** (1) The legal rate of interest on all notes, accounts and contracts shall be six percent (6%) per annum, calculated according to the actuarial method, but contracts may be made, in writing, for payment of a finance charge as otherwise provided by this act or as otherwise authorized by law.

(2) Any borrower may contract for and agree to pay a finance charge for any loan or other extension of credit made directly or indirectly to a borrower, which will result in a yield not to exceed ten percent (10%) per annum, calculated according to the actuarial method, which shall be known as the contract rate.

(3) Notwithstanding the foregoing and any other provision of law to the contrary, any domestic or foreign corporation organized for profit may agree to pay any rate of finance charge in excess of the maximum rate provided in this section, but not to exceed fifteen percent (15%) per annum, calculated according to the actuarial method, on any contract or other obligation under which the principal balance to be repaid shall originally exceed Two Thousand Five Hundred Dollars ($2,500.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally proposed to be advanced shall exceed Two Thousand Five Hundred Dollars ($2,500.00), or on any extension or renewal thereof; and as to any such agreement, the claim or defense of usury by such corporation, its successors, guarantors, assigns, or anyone on its behalf is prohibited.

(4) Notwithstanding the foregoing and any other provision of law to the contrary, any nonprofit corporation organized to own, operate or finance any educational facility or function may agree to pay any rate of finance charge in excess of the maximum rate provided in this section, but not to exceed fifteen percent (15%) per annum, calculated according to the actuarial method, on any contract, or other obligation under which the principal balance to be repaid shall originally exceed Two Thousand Five Hundred Dollars ($2,500.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally proposed to be advanced shall exceed Two Thousand Five Hundred Dollars ($2,500.00), or on any extension or renewal thereof; and as to any such agreement, the claim or defense of

usury by such corporation, its successors, guarantors, assigns, or anyone on its behalf is prohibited.

(5) Notwithstanding the foregoing and any other provision of law to the contrary, any partnership may agree to pay any rate of finance charge in excess of the maximum rate provided in this section but not to exceed fifteen percent (15%) per annum, calculated according to the actuarial method, on any contract or other obligation under which the principal balance to be repaid shall originally exceed Two Hundred Fifty Thousand Dollars ($250,000.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally contracted in writing to be advanced shall exceed Two Hundred Fifty Thousand Dollars ($250,000.00), or on any extension or renewal thereof; and as to any such agreement, the claim or defense of usury by such partnership or its guarantors, assigns, or anyone on its behalf is prohibited. This paragraph shall not apply to any contract or other obligation relating to the purchase of agricultural lands or secured by a security instrument on agricultural lands or the financing of the production of agricultural products or livestock, agricultural processing or other manufacturing businesses.

(6) Notwithstanding the foregoing and any other provision of law to the contrary, any retail seller, and any lender or issuer of credit cards may lawfully contract for and receive a finance charge for credit sales of goods, services or merchandise certificates or for cash advanced or other credit extended pursuant to a revolving charge agreement by applying a periodic rate no greater than one and one-half percent (1 1/2%) per month to:

(a) the average daily balance of the account, exclusive of finance charge, in each billing period;

(b) an amount that shall not exceed the balance of the account, exclusive of finance charge, on the first day of each billing period without adding purchases or miscellaneous debits to the account during the billing period; or

(c) any balance of the account during each billing period which does not produce an amount of finance charge in excess of that permitted by (a) or (b).

Notwithstanding the foregoing, the maximum finance charge which may be charged or collected on any balance in excess of Eight Hundred Dollars ($800.00) shall be determined by applying a periodic rate no greater than one and one-quarter percent (1 1/4%) per month to that portion of the applicable balance which is in excess of Eight Hundred Dollars ($800.00) but not greater than Twelve Hundred Dollars ($1200.00) and by applying a periodic rate not greater than one percent (1%) of the principal balance which exceeds Twelve Hundred Dollars ($1200.00).

No finance charge may be charged or collected for purchases of goods or services or merchandise certificates until one (1) month after the billing statement date on the billing statement where such purchases of goods or services initially appear. The billing statement shall not state that Mississippi law requires the imposition of a finance charge. The term "month" as used in this paragraph (6) means either (1) a calendar month, or (2) a minimum of thirty (30) consecutive calendar days, or (3) the number of days elapsing between the same numerical calendar

day of successive calendar month. "Revolving charge agreement" means an agreement by the terms of which retail sellers may sell goods, services, merchandise certificates, or by which a lender or issuer finances the purchase of goods or services or by which a lender makes cash advances, by the use of credit cards or otherwise, pursuant to which the amount financed is payable either within a stated period or in installments over a period of time, and the terms of which may provide for finance charges to be assessed on the unpaid balance as it exists from time to time; the term "revolving charge agreement" does not include the lending of money evidenced by a promissory note.

(7) Notwithstanding the foregoing and any other provision of law to the contrary, the maximum finance charge which may be contracted for and received for any loan or extension of credit made by a licensee under the Small Loan Regulatory Act (Sections 75-67-101 through 75-67-135, Mississippi Code of 1972), and the Small Loan Privilege Tax Law (Sections 75-67-201 through 75-67-243, Mississippi Code of 1972), may result in a yield not to exceed the following annual percentage rates calculated according to the actuarial method:

(a) Thirty-six percent (36%) per annum for the portion of the unpaid balance of the amount financed that is not greater than Six Hundred Dollars ($600.00);

(b) Thirty-three percent (33%) per annum for the portion of the unpaid balance of the amount financed in excess of Six Hundred Dollars ($600.00) but not greater than Eighteen Hundred Dollars ($1800.00);

(c) Twenty-four percent (24%) per annum for the portion of the unpaid balance of the amount financed in excess of Eighteen Hundred Dollars ($1800.00) but not greater than Forty-Five Hundred Dollars ($4500.00);

(d) Twelve percent (12%) per annum for the portion of the unpaid balance of the amount financed in excess of Forty-Five Hundred Dollars ($4500.00).

Nothing in this paragraph (7) shall prohibit lending money or handling, negotiating or arranging loans for a finance charge that is less than that specified herein. This paragraph (7) does not limit or restrict the manner of contracting for the finance charge, whether by way of add-on, discount, or otherwise, so long as the annual percentage rate of the finance charges does not exceed that permitted by this section.

(8) Notwithstanding the foregoing or any other provision of law to the contrary, the maximum finance charge which may be contracted for or received for any loan or extension of credit made by any lender or by any retail seller in connection with sales of manufactured moveable homes, commonly known as mobile homes, may result in a yield not to exceed the following annual percentage rates calculated according to the actuarial method:

(a) Twenty-five percent (25%) per annum on that part of the unpaid balance of the amount financed which does not exceed One Thousand Dollars ($1,000.00);

(b) Eighteen percent (18%) per annum on the part of the unpaid balance of the amount financed which is more than One Thousand Dollars ($1,000.00) but does

not exceed Two Thousand Five Hundred Dollars ($2,500.00);

(c) Twelve percent (12%) per annum on that part of the unpaid balance of the amount financed which is more than Two Thousand Five Hundred Dollars ($2,500.00).

(9) The term "finance charge" as used in this act means the amount or rate paid or payable, directly or indirectly, by a debtor for receiving a loan or incident to or as a condition of the extension of credit, including but not limited to interest, brokerage fees, finance charges, loan fees, discount, points, service charges, transaction charges, activity charges, carrying charges, finders fees or any other cost or expense to the debtor for services rendered or to be rendered to the debtor in making, arranging or negotiating a loan of money or an extension of credit and for the accounting, guaranteeing, endorsing, collecting and other actual services rendered by the lender; provided, however, that recording fees, motor vehicle title fees, attorney's fees, insurance premiums, fees permitted to be charged under the provisions of Section 79-7-7, Mississippi Code of 1972, and with respect to a debt secured by an interest in land, bona fide closing costs and appraisal fees incidental to the transaction shall not be included in the finance charge. Subject to the other provisions of this act, the finance charge may be calculated on the assumption that the indebtedness will be discharged as it becomes due, and prepayment penalties and statutory default charges shall not be included in the finance charges. None of the previous paragraphs shall limit or restrict the manner of contracting for such finance charge, whether by way of add-on, discount, or

otherwise, so long as the annual percentage rate does not exceed that permitted by law. If a greater finance charge than that authorized by this section or by other applicable law shall be stipulated for or received in any case, all interest and finance charge shall be forfeited, and may be recovered back, whether the contract be executed or executory. If a finance charge be contracted for or received that exceeds the maximum authorized by law by more than one hundred percent (100%), the principal and all finance charges shall be forfeited and any amount paid may be recovered by suit. The provisions of this act shall not restrict the extension of credit pursuant to any other applicable law. A licensee under the Small Loan Regulatory Act (Sections 75-67-101 through 75-67-135, Mississippi Code of 1972), and the Small Loan Privilege Tax Law (Sections 75-67-201 through 75-67-243, Mississippi Code of 1972), may contract for and receive finance charges as authorized by paragraph (7) hereof regardless of the purpose for which the loan or other extension of credit is made.

(10) No lender or other person shall use multiple notes, accounts, contracts or agreements with intent to obtain a higher finance charge than permitted by law. If a finance charge be stipulated for or received in any case in violation of this paragraph, all interest and finance charge shall be forfeited.

(11) No lender or other person shall charge a sum or prepayment penalty for the prepayment of any note or evidence of a debt secured in whole or in part by a lien on real estate greater than the following:

(a) Five percent (5%) of the unpaid principal balance if prepaid during the first year;

(b) Four percent (4%) of the unpaid principal balance if prepaid during the second year;

(c) Three percent (3%) of the unpaid principal balance if prepaid during the third year;

(d) Two percent (2%) of the unpaid principal balance if prepaid during the fourth year;

(e) One percent (1%) of the unpaid principal balance if prepaid during the fifth year;

(f) No penalty if prepaid more than five (5) years from date of the note creating the debt.

Provided, that this paragraph shall apply only to loans, the security for which is a lien on real estate comprising a single family dwelling or a single family condominium unit, or on real estate used primarily for agricultural or livestock purposes; further provided that this paragraph shall not apply where a greater penalty is required by any law or regulation of the United States of America, or agency thereof.

* * *

**Section 7.** Loans made and credit extended prior to the effective date of this act shall continue to be governed by the provisions of laws governing such loans and extensions of credit which were in force at the time such loans or extensions of credit were made, including laws repealed hereby except that finance charges contracted for or received prior to the effective date of this act shall not be unlawful if the finance charge contracted for or

received conforms with the provisions of this act or other law then in effect. Any loan or note renewed, refinanced, deferred or otherwise extended or altered on or after the effective date of this act shall conform with the provisions of this act.

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**Section 9.** This act shall take effect and be in force from and after July 1, 1974.

**Approved: April 19, 1974.**